No. 22,733

In the United States Court of Appeals for the Ninth Circuit

SYDNEY N. FLOERSHEIM, AN INDIVIDUAL TRADING AND DOING BUSINESS AS FLOERSHEIM SALES COMPANY AND NATIONAL RESEARCH COMPANY, *Petitioner*,

v.

FEDERAL TRADE COMMISSION, *Respondent*.

On Petition to Review an Order of the Federal Trade Commission

BRIEF FOR RESPONDENT

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ISSUES PRESENTED FOR REVIEW

1. Whether there is substantial evidence to support the Commission's findings that petitioner's forms, demanding the payment of debts and seeking information concerning delinquent debtors, are misleading or have the tendency and capacity to deceive.

2. Whether petitioner received adequate notice that he was being charged with misrepresenting that a third party, unrelated to the creditor, was interested in a debt or in seeing that it was collected.

3. Whether the Commission was estopped from issuing a new complaint with regard to petitioner's unfair and deceptive acts and practices engaged in subsequent to the issuance of an outstanding order to cease and desist and relating primarily to acts and practices not covered by that prior order.

4. Whether the Commission has abused its discretion in its formulation of an order to cease and desist.

STATEMENT OF THE CASE

This case arises upon a petition to review an order to cease and desist issued by the Federal Trade Commission at the conclusion of a proceeding upon a complaint which charged petitioner with engaging in unfair and deceptive acts and practices in commerce in violation of Section 5 of the Federal Trade Commission Act.[1]

History prior to present proceedings

On June 1, 1956, the Commission ordered petitioner Sydney N. Floersheim, then trading as S. Floersheim Sales Company, and one Mitchell S. Mohr, then trading as National Research Company, in connection with the business of obtaining information concerning delinquent debtors or selling forms for use in obtaining such information (skip tracer forms), to cease and desist from using or furnishing forms which make certain deceptive representations. *Mitchell S. Mohr,* Docket 6236, 52 F.T.C. 1466 (1956).

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[1] The pertinent provisions of the Act are as follows:

Sec. 5(a)(1). "* * * [U]nfair or deceptive acts or practices in commerce, are hereby declared unlawful." 66 Stat. 632, 15 U.S.C. 45(a)(1).

Sec. 5(a)(6). "The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations * * * from using * * * unfair or deceptive acts or practices in commerce." 66 Stat. 632, 15 U.S.C. 45(a)(6).

Sec. 5(b). "Whenever the Commission shall have reason to believe that any such person, partnership, or corporation has been or is using any * * * unfair or deceptive act or practice in commerce, and if it shall appear to the Commission that a proceeding by it * * * would be to the interest of the public, it shall issue * * * a complaint stating its charges * * * and containing a notice of a hearing * * *. If upon such hearing the Commission shall be of the opinion that * * * the act or practice in question is prohibited by this Act, it shall make a report in writing in which it shall state its findings as to the facts and shall issue * * * an order requiring such person, partnership, or corporation to cease and desist from using * * * such act or practice * * *." 52 Stat. 112, 15 U.S.C. 45(b).

Subsequently, disagreement arose between Floersheim and Mohr and the Commission as to the meaning and scope of the order. The Commission believed that the skip tracer cards used by Floersheim and Mohr continued to have the tendency and capacity to mislead and deceive. The Commission, therefore, in November 1958, deeming that the public interest so required, reopened the proceeding and modified the order. 55 F.T.C. 720 (1958). On petition to review filed by Floersheim and Mohr, this Court sustained the Commission's action and affirmed and enforced its modified order to cease and desist. *Mohr* v. *Federal Trade Commission,* 272 F. 2d 401 (9th Cir. 1959), *cert. denied,* 362 U.S. 920 (1960).

Floersheim purchased Mohr's interest in National Research Company in 1961 and became the sole proprietor of the enterprise (I 239; I-B 290-91, 418).[2] In November 1962, the Commission petitioned this Court to adjudge Floersheim in criminal contempt for alleged violations of the Court's order of affirmance and enforcement. This Court held that the Commission's order did not forbid certain of the practices complained of. As to others, it held that Floersheim had violated the order but that he was not guilty of criminal contempt as the Court could not find that the violations were flagrant, deliberate and reckless. At the same time, the Court expressed hope that Floersheim would voluntarily comply with the language and spirit of the order so the matter finally might be terminated and not be before the Court again. *In re Floersheim,* 316 F. 2d 423 (9th Cir. 1963).

Both the Commission's original order to cease and desist and its modified order as affirmed and enforced by this

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[2] The Transcript of the Record prepared pursuant to this Court's Rule 4 is in three volumes designated "Vol. I," "Vol. I-A" and "Vol. I-B." References to materials in the Transcript are made by citing the volume followed by the page number in that volume. The cited pagination in Vol. I apears at either the lower left-hand or lower right-hand corner of each page. The cited pagination in Vols. I-A and I-B appears at the upper right-hand corner of each page.

Other abbreviations used include: CX—Commission Exhibit; Pet. Br.—petitioner's brief to this Court.

Court, as well as the matters brought to this Court's attention in the contempt proceeding, were limited to the use, sale and distribution of skip tracer forms. *Forms for use in collecting delinquent accounts were not involved.*

Proceedings before the Commission

A. *Pleadings*

The Commission's complaint in the instant case was issued on November 7, 1966. It charged that Floersheim, operating as Floersheim Sales Company in Los Angeles and as National Research Company at 748 Washington Building, Washington, D.C., was in the business of preparing and selling in commerce printed forms and other materials designed and intended for use, *with Floersheim's assistance,* in collecting delinquent debts and in securing information concerning delinquent debtors; that these forms and materials contained various false, misleading and deceptive representations; and that by placing them in the hands of others petitioner provided them with false, misleading and deceptive means whereby they may secure payment of delinquent accounts or obtain information about delinquent debtors (I 2-5).

More specificially, it was alleged that the skip tracer forms simulated official and governmental documents including the utilization of fictitious and official sounding names such as "Claimants Information Questionnaire," "Current Employment Records," "Change of Address" and "Questionnaire," and the address "748 Washington Building, Washington, D.C."; "that while these forms contained a statement disclosing their purpose and that they were not connected with the United States Government, the statement was in such small type and was so inconspicuous that recipients would be unlikely to notice it (I 3-4).

It was further alleged that purchasers of the skip tracer forms would fill in each form with the name and address of the debtor, or other person from whom information concerning the debtor was to be requested, and would insert the form and a return envelope in a brown window envelope

similar to those used by the United States Government. The return address on the brown window envelope was "748 Washington Building, Washington, D.C." Also printed on the front was "The Form Enclosed is Confidential. No One Else May Open." The return envelope was addressed to one of the fictitious names, previously listed, at 748 Washington Building, Washington, D.C. Purchasers would send the forms so prepared for mailing to Floersheim in Washington, D.C. Petitioner would stamp them with a postage machine bearing a Washington, D.C., postmark and mail them from Washington. Responses made to the Washington, D.C., address would be sent to the purchasers of the forms (I 4).

The forms and material sold for the purpose of collecting delinquent accounts were also alleged to simulate official or government documents. The name "Payment Demand" and the address "748 Washington Building, Washington 5, D.C." were used as well as the statement "Notice mailed from Washington, D.C. by Payment Demand." The forms also were alleged to contain a statement as to a creditor's rights to collect judgment from the debtor in the pertinent state, the statement sometimes being incorrect. These forms were also prepared by creditors for mailing by Floersheim from Washington, D.C. (I 4).

It was also charged that Floersheim's sales literature falsely represented that his forms used in collecting delinquent debts had been determined by the Federal Trade Commission to be in compliance with its order to cease and desist issued in *Mitchell S. Mohr,* Docket No. 6236, and that the forms had been approved by the Commission (I 4-5).

Floersheim generally admitted the manner in which he conducted his business as well as the description of his forms and other materials, as set forth in the complaint, but denied that the forms or their use were false, misleading or deceptive. He also admitted representing that his forms used in collecting delinquent debts had been determined by the Commission to be in compliance with its order to cease and desist issued in Docket No. 6236 and that

the forms had been approved by the Commission, but asserted that these representations were true (I 17-20).

B. *The examiner's initial decision*

The examiner, after hearings, held that Floersheim had misrepresented, and placed in the hands of purchasers of his forms the means and instrumentalities of misrepresenting, that the requests for information in the skip tracer forms and the demands for payment in the Payment Demand forms were from a governmental agency or were to be used for official purposes; and that this tended to induce recipients of the forms to supply information or to do acts which they otherwise might not have done (I 93, 102, 104-8, 120-22).

The brown window envelopes in which the forms were mailed were deemed particularly deceptive as simulating government or official origin (I 93-5, 99-100, 104, 106). The skip tracer forms were held similarly deceptive and to reinforce the misrepresentation created by the brown window envelopes (I 93, 99, 106, 120).[3] The examiner found that the statement on the forms to the effect that their purpose is to secure information concerning a delinquent debtor and that there is no governmental connection is in such small type and is so inconspicuous that it is unlikely to be noticed by recipients (I 98, 106, 120).

Reply envelopes sent with the skip tracer forms, while not deemed deceptive in themselves, were held to contribute to the deception caused by the outside envelopes and the forms (I 101, 120-21). The Payment Demand forms also were held to contribute to and perpetuate the deception created by the brown window envelopes, but were held not to be misleading in themselves (I 102, 107, 112, 121).

The examiner found false, misleading and deceptive Floersheim's representations that his Payment Demand forms had been determined by the Commission to be in

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[3] Floersheim is in error in stating (Pet. Br. 9) that the examiner held that the skip tracer forms were not deceptive.

compliance with the requirements of the Commission's order to cease and desist in *Mitchell S. Mohr,* Docket No. 6236, and that the Commission had approved these forms (I 108, 121).

While recognizing that the facts proved might justify holding that Floersheim had misrepresented that a third party, unrelated to the creditor, had an interest in the debt or in its collection, the examiner held that the complaint did not encompass such a charge (I 85-7, 115, 121). He also dismissed the charge that Floersheim had misrepresented the rights of creditors to collect judgments against debtors, holding that the matter was not too important and that the statement had not been proved to be substantially deceptive (I 102-03, 122).

The examiner, therefore, issued an order to cease and desist which was narrowly drawn, reflecting his limited findings of violation (I 136-40).

C. *The Commission's opinion*

On cross-appeals, the Commission denied Floersheim's appeal and granted that of complaint counsel. It issued an opinion which included findings of fact and conclusions of law, and adopted the examiner's findings to the extent not inconsistent with its own opinion. It also modified the examiner's order to conform to the views of the Commission (I 234-37, 242).

The Commission rejected Floersheim's contentions that it could not proceed without first rescinding approvals of reports filed by him as to compliance with the prior order in Docket No. 6236. In addition to the absence of any rule or reason requiring such revocation, the Commission pointed out that one of the letters relied upon by Floersheim was from the Commission's Assistant General Counsel for Compliance, did not purport to speak for the Commission, and merely stated that, in his opinion, *collection forms* submitted by Floersheim did not violate the Commission's order (which was limited to *forms seeking information* concerning delinquent debtors) *"inasmuch as they do not request any information concerning delinquent debtors"*

(emphasis supplied). It was also explained that a subsequent letter from the Commission largely conformed to this Court's holding in the contempt action that certain of Floersheim's practices were not included within the order to cease and desist. Revocation of the approval given to the compliance report, therefore, was not deemed a prerequisite to further action looking toward prohibition of practices not encompassed by that order (I 245-47).

Petitioner's additional contention that the Commission could not issue a new complaint, but could only reopen the old proceeding, was also rejected. The Commission held that it could proceed relative to practices not covered by the prior order, in its discretion, either by reopening that order or by issuing a new complaint; that Floersheim not only had no "vested right" in the reopening procedure but that the Commission's choice was a matter of indifference to him since no substantial rights could be impaired by the choice. Under either procedure, Floersheim would be entitled to a full evidentiary hearing, to a decision based on the record and to a review by a court of appeals (I 247-50).

While not obliged to do so, the Commission explained why it had decided to issue a new complaint rather than to proceed for modification of the existing order. This was because the challenged practices were different in many respects from those involved in the prior proceeding [4] and, in a new proceding, the Commission could focus on the issues raised by Floersheim's current business practices rather than on irrelevant side issues relating to practices that gave rise to the prior order or to details of Floersheim's compliance with that order (I 249).

The Commission also reversed the examiner's holding that the complaint had failed to plead the "third party mailing" issue, *i.e.*, whether Floersheim's forms represent

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[4] The bulk of Floersheim's business in 1966 consisted of the sale of "Payment Demand" forms, a type of form not involved in the prior proceeding or order. Thus, of some 2,900,000 forms sold, over 2,000,000 were "Payment Demand." Only 766,000 were skip tracer forms, the subject of the prior order to cease and desist (I-B 417-18).

that a third party, unrelated to the creditor, has an interest in the debt or in its collection. The Commission held that the complaint not only comprehended such a charge, but that Floersheim was aware of complaint counsel's position that the charge was adequately pleaded and, recognizing that complaint counsel's position ultimately might be sustained, Floersheim had introduced evidence as a defense to the charge; that, under these circumstances, Floersheim could not possibly be prejudiced by the Commission's holding that the third party issue was included. The Commission held further that since the undisputed evidence, clearly admissible under the specific allegations of the complaint, established that Floersheim's forms created the "third party" deception, and he was apprised of this theory of the case and had ample opportunity to meet this charge, the Commission could proscribe this deceptive practice even if it might be encompassed only by implication in the complaint (I 258-61).

In passing upon the tendency and capacity of Floersheim's forms to mislead or deceive, the Commission explicitly stated that its determination did not turn upon the credibility or demeanor of witnesses, or the examiner's analysis, but upon its own independent first-hand examination of the forms (I 251).

From its examination of the envelopes and forms, the Commission found that they clearly were deceptive and misleading, "creating the impression that they came from the government or some other official source or third party, rather than from the creditor" (I 251). More specifically, the envelopes, in appearance and format, were found to simulate those used by the United States Government for official purposes (I 251). The skip tracer forms themselves were found to be deceptive, *inter alia,* because of their general appearance and similarity to government checks, the use of fictitious names, such as "Claimant's Information Questionnaire," the prominent use of the address, "748 Washington Building, Washington, D.C." (on the return envelopes as well as on the forms), the peremptory nature of the requests for information and the directive on "Claimant's Information Questionnaire" to

"Fill in this form for identification to aid collection in full for claimant." These factors were all deemed to conceal the true nature of the request for information (I 251-52).

The effects of the subterfuge were held not to be dispelled by the disclaimer in small print which was deemed inconspicuous and unintelligible to recipients, who are often persons of low income with minimal formal education (I 252-53).

Petitioner's collection or "Payment Demand" forms sent in the same brown envelopes, frequently to uneducated or illiterate debtors, were similarly held to have the capacity and tendency to deceive. This evaluation of the forms was held substantiated by the testimony of debtors and persons familiar with legal problems of the poor, including testimony to the effect that low income debtors believe that any notice from Washington, D.C., must be from the government. This assumption was held exploited by mailing the forms from Washington, D.C., by prominently using the Washington, D.C., address on the envelopes and the forms, by the statement "NOTICE MAILED FROM WASHINGTON, D.C., BY PAYMENT DEMAND," and the prominent use of elaborate style type on various forms to simulate legal documents. These were all held to imply that the government or some other third party was interested in seeing that the debt was collected (I 253-56).

Reversing the examiner, the Commission also found deceptive the statement on the Payment Demand forms which purported to state a creditor's rights under state law to attach his debtor's property. The statement failed to take into account numerous variations in state law, *e.g.*, exemptions for particular kinds of property, limitations on wage or salary attachments, and even the right of an alleged debtor to appear and defend himself in court before a judgment might be secured and executed against him. The Commission found that the purpose of this statement was to intimidate and deceive the debtor by presenting a creditor's rights in overly broad and threatening terms (I 256-57).[5]

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[5] Floersheim's brief to this Court does not direct itself to this finding of deceptive practice nor to that portion of the order to cease

The Commission did adopt the examiner's findings to the effect that Floersheim's promotional literature misrepresented that his forms had been approved by the Commission and had been deemed to be in compliance with the Commission's prior order (I 256).[6]

The Commission, therefore, modified the examiner's proposed order to proscribe the unlawful practices it had found and, as modified, issued it as its final order to cease and desist (I 234-37).

The facts

There is no substantial dispute as to the facts. Floersheim admittedly sells and distributes in commerce the forms that are in evidence and conducts his business in the manner found by the Commission. His objections go primarily to the representations attributed by the Commission to his forms and to the inferences and conclusions drawn by the Commission. In making the following summary of the Commission's findings as to the facts, much of the detailed description of the forms has been deferred to the argument portion of this brief.

Petitioner Sydney N. Floersheim resides in California and sells skip tracer and Payment Demand forms and related materials from Los Angeles, California, under the Floersheim Sales Company trade name. Sales are made to business concerns throughout the country with delivery either from California or the District of Columbia so that Floersheim maintains a substantial course of trade in commerce. Skip tracer forms are sold to creditors who are seeking to locate or secure information concerning debtors. Payment Demand forms are sold to creditors to aid in collecting delinquent accounts. The forms are designed and intended by Floersheim to be used by Floersheim's customers for these purposes. While sales are made from California, an office is maintained in the Washington Building, Washing-

and desist which proscribes such a practice (I 236). Floersheim, therefore, may be deemed to have waived any objection thereto (see *infra*, p. 28).

[6] Similarly, Floersheim's brief to this Court is silent as to this finding of deceptive practice and to that portion of the order to cease and desist which covers such a practice (I 237).

ton, D.C., where the forms are published by Floersheim while trading as National Research Company. He does not operate as a collection agency (I 84, 91-2, 242, 260).

The forms, together with the brown window envelopes in which they are to be mailed, are sent to the purchasing creditor. The creditor inserts the name and address of the person to whom the form is to be sent (*i.e.,* the debtor or other person from whom information is sought) and other pertinent data, according to the type of form used, and places the form in the brown window envelope so the name and address shows.

The forms are now ready to be mailed to the addressees, but they are not. Instead, the creditor sends them to Floersheim in Washington, D.C., who affixes a blue metered stamp to each envelope depicting a spread eagle and mails them from Washington, whereby a Washington, D.C., postmark is affixed (see, *e.g.,* CX 23A, 48B, 55B). The brown window envelope is similar in color, size and format to those used by the United States Government. On the upper left-hand corner is the return address, 748 Washington Bldg., Washington 5, D.C. Also prominently printed on the envelope is "The Form Enclosed is Confidential. No One Else May Open" (I 93, 99-101, 242-43, 251).

The skip tracer forms are on check-size IBM cards, and some of them are the green shade of a United States Government check. Many prominently use the word "Questionnaire," one being entitled "Claimant's Information Questionnaire."[7] They all demand various information in an authoritative and peremptory way (*e.g.,* "FILL OUT REVERSE SIDE OF THIS FORM AND RETURN WITHIN 5 DAYS;" or "YOU HAVE CHANGED EMPLOYERS. COMPLETE QUESTIONNAIRE AND RETURN TO 748 WASHINGTON BUILDING, WASHINGTON, D.C."), and emphasize the Washington Building, Washington, D.C., address. They are accompanied by brown business reply envelopes which, varying with the form to be returned, are addressed to:

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[7] This form (CX 36) also directs: "Fill In This Form For Identification To Aid Collection In Full For Claimant."

Claimant's Information Questionnaire [or]
Current Employment Records [or]
Change of Address [all at]
748 Washington Building
Washington 5, D.C. (I 95, 97, 99-101, 243, 251-52).

The forms do bear the statement: "The purpose of this card is to obtain information concerning a delinquent debtor, and to further advise that this is not connected in any way with the United States Government." This disclaimer, however, is inconspicuous and unclear (I 98-99, 243-44, 252-53).

The procedure in sending Payment Demand forms to debtors is similar to that for sending skip tracer forms. The forms are filled in by the purchasers, placed in the same type brown window envelopes used with skip tracer forms and sent to Floersheim in Washington, D.C., for stamping and mailing from that city. Unlike skip tracer forms, responses are to be made directly to the creditor rather than to petitioner. Payment Demand forms are on IBM cards the size of a government check, and some of them are the green shade of a United States Government check. All are headed substantially as follows:

Payment Demand
748 Washington Building
Washington 5, D.C.

On the reverse side is "NOTICE MAILED FROM WASHINGTON, D.C. BY PAYMENT DEMAND." Other Payment Demand forms read:

Payment Demand
748 Washington Building
Washington 5, D.C.

Requests your Appearance in
the office of the creditor,
at the time specified.

In addition, some forms use elaborate style print that simulates legal documents (I 102-5, 244-45, 254-55).

Many recipients of the forms are individuals with low income who have had a minimal formal education; some

are totally uneducated or illiterate. Many people, particularly those who are uneducated, believe that anything from Washington, D.C., is from the United States Government (I 252-54).

In addition to the facts establishing the tendency and capacity of the forms to deceive, the record demonstrates instances where recipients were in fact deceived into believing that Payment Demand forms were from the United States Government (I 253-54).

Payment Demand forms also contain a statement to the effect that, subject to the laws of the appropriate state, a creditor may request an attorney to attach after judgment (before judgment in certain states) the debtor's property, "such as Automobile, Jewelry, Boat, Live Stock, Crops, Machinery, House, Real Estate, Bank Account, Bank Vault, Stocks, Bonds and Earnings, Commission or Salary." While the forms are sent to debtors in every state, they do not reflect the numerous variations in state law that limit a creditor's right to attach property, *e.g.*, exemptions for particular kinds of property, or limitations on wage or salary attachments. Neither do the forms notify the debtor that a judgment will not be entered against him without an opportunity to appear and defend himself in court (I 256-57).[8]

In addition to the Payment Demand forms which creditors forward to Floersheim for mailing to debtors, Floersheim sells follow-up forms which creditors mail directly to those debtors who have responded to Payment Demand, in Washington, D.C. These forms continue the demand for payment in terms of reference to the debtor's "LETTER TO PAYMENT DEMAND, WASHINGTON, D.C., PROMISING PAYMENT" (I 245).

SUMMARY OF ARGUMENT

It is in the public interest to proscribe unfair or deceptive acts and practices in the collection of debts and in the securing of information concerning delinquent debtors. Floersheim's sale in commerce of forms which are subsequently

[8] As noted *supra*, p. 9, n. 5, petitioner does not contest the Commission's finding as to the deceptive character of this representation.

used to deceive and mislead is itself an unfair and deceptive act or practice covered by the Federal Trade Commission Act. In addition, Floersheim plays an active role in commerce in deceiving debtors and others.

The Commission's findings that Floersheim's forms have the tendency and capacity to mislead and deceive are supported by substantial evidence and are, therefore, conclusive. The tendency and capacity to deceive is obvious from an examination of the forms themselves. While not required, there is also supporting testimony of persons who have been deceived. The "disclosure" in the skip tracer forms is in small print and is otherwise inconspicuous; it is insufficient to undo the overall deception of the forms, the envelopes in which they are sent and the return envelopes. The size and placement of affirmative disclosures are matters of judgment for the Commission.

Floersheim received adequate notice that he was being charged with misrepresenting that a third party, unrelated to the creditor, was interested in the debt or in its collection. The complaint encompassed the charge; complaint counsel consistently took the position that the "third party" charge was included; and the examiner felt that the facts which were alleged covered such a practice and warned petitioner that, in his opinion, the Commission probably would find this to be one of the issues. Further, Floersheim's counsel acknowledged and expressed his understanding of complaint counsel's position and recognized that this was an issue which might be held to be included. Not only did he state that he would not be taken by surprise if the charge were held to be included, but he announced his readiness to meet the charge and introduced evidence to meet it.

The Commission's rules do not require that it act with regard to Floersheim's unfair and deceptive acts and practices, engaged in subsequent to the issuance of a prior order to cease and desist, only by reopening the prior proceeding. The Commission's choice to issue a new complaint was a proper exercise of its judgment, particularly since the present case, in large part, deals with matters not covered by the prior order. Floersheim has no vested right in a re-

opening procedure, and he has not been prejudiced by the Commission's choice to issue a new complaint.

The Commission did not abuse its discretion in formulating the order to cease and desist. The remedy selected bears a reasonable relation to the unfair and deceptive acts and practices that were found to exist. The order does not require Floersheim to discontinue his business of selling forms or otherwise engaging in the business of securing information concerning delinquent debtors or assisting in the collection of delinquent accounts. Neither does it preclude Floersheim from mailing his forms from Washington, D.C. All it requires is that he conduct his business in a truthful and nondeceptive manner.

ARGUMENT

Preliminary statement

Floersheim asserts (Pet. Br. 18-19) that his forms and materials are not deceptive because deceit requires damage or injury to someone, and there is no damage or injury since his forms are sent to debtors or to someone else as a means of reaching one who is a debtor. However, as this Court stated in *Silverman* v. *Federal Trade Commission,* 145 F. 2d 751, 753 (9th Cir. 1944):

> Petitioner's scheme is a cheap swindle, and the argument that it is less so because it may in certain cases trap swindling debtors is not one pleasing to entertain.
>
> Nor is there any support for petitioner's contention that it is not a matter for the Commission's concern because the swindled person suffers no pecuniary damage.

Floersheim's assertion is particularly surprising since he was a party to *Mohr* v. *Federal Trade Commission,* 272 F. 2d 401, 405 (9th Cir. 1959), *cert. denied,* 362 U.S. 920 (1960), where this Court held that it was in the public interest to prevent the use of forms that deceived debtors into taking action they otherwise would not have taken or which otherwise, by deception, resulted in bringing delinquent debtors to task.

In addition to *Silverman* and *Mohr*, it has been uniformly held that it is in the public interest for the Commission to proscribe the use of unfair or deceptive acts and practices in the collection of debts and in the securing of information concerning delinquent debtors.[9] And this includes false representations that a third party has acquired an interest in the debt or in its collection. *Slough* v. *Federal Trade Commission*, 396 F. 2d 870, 872 (5th Cir. 1968), *cert. denied*, 37 U.S.L. Week 3208 (Dec. 10, 1968).[10] In addition to numerous other orders to cease and desist from engaging in practices similar to those here involved, the Commission has issued Guides Against Debt Collection Deception which warn against such practices (16 CFR 237, revised 33 Fed. Reg. 5661 (1968)).

Floersheim's additional contention (Pet. Br. 19-20) that, while he sells the forms in question in commerce, the Commission lacks jurisdiction since the alleged deception is in the use of the forms and they are used after the interstate sale, is equally devoid of merit. In *James* v. *Federal Trade Commission*, 253 F. 2d 78, 80 (7th Cir. 1958), *cert. denied*, 358 U.S. 821 (1958), petitioners similarly claimed immunization from Section 5 for their sales in commerce of punchboards, since they did not themselves participate in the ultimate use of the boards to make sales by chance at the local level. The court rejected this position, stating simply, "To describe their position posits the refutation of it. *Federal Trade Commission* v. *Winsted Hosiery Co.*, 258 U.S. 483 (1922)."[11]

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[9] See, *e.g.*, *National Clearance Bureau* v. *Federal Trade Commission*, 255 F. 2d 102, 103 (3d Cir. 1958); *Dejay Stores, Inc.* v. *Federal Trade Commission*, 200 F. 2d 865, 867 (2d Cir. 1952); *Bennett* v. *Federal Trade Commission*, 200 F. 2d 362, 363 (D.C. Cir. 1952); *Rothschild* v. *Federal Trade Commission*, 200 F. 2d 39, 42-3 (7th Cir. 1952).

[10] See also *William H. Wise Co.* v. *Federal Trade Commission*, 246 F. 2d 702 (D.C. Cir. 1957), *cert. denied*, 355 U.S. 856 (1957).

[11] To the same effect, see *Peerless Products, Inc.* v. *Federal Trade Commission*, 284 F. 2d 825, 826 (7th Cir. 1960).

Federal Trade Commission v. *Bunte Bros., Inc.*, 312 U.S. 349 (1941), upon which Floersheim relies (Pet. Br. 20), actually sup-

Winsted Hosiery, 258 U.S. at 494, is the leading case for the principle that one who places in the hands of another the means of consummating a fraud or an unfair practice is himself guilty of a violation of the Federal Trade Commission Act.[12] Here, Floersheim has engaged in substantial interstate business, placing in the hands of creditors materials designed and intended for the very use to which they were put. He has customers in every state of the Union, some 5,000 in all, of whom 1500 purchase almost 3,000,000 forms annually (I-A 16, 87; I-B 295-6).

It is clear, therefore, that Floersheim's acts and practices of selling and distributing in commerce his materials to creditors for their subsequent deceptive use constitute "unfair" and "deceptive acts and practices in commerce" covered by Section 5 of the Federal Trade Commission Act. Further, Floersheim's activities are not limited to these sales in commerce. To the contrary, he plays an active role in the use of the forms to deceive creditors and others. For, as part of the operating procedure, after the forms are completed by the creditors, they are sent to Floersheim in Washington, D.C., and he stamps the envelopes and mails them to the debtors and others from whom information is sought. Responses to skip tracer forms are received by Floersheim in Washington and disseminated by him to the appropriate creditors throughout the country. Sometimes responses to Payment Demand forms are made to Floersheim in Washington, D.C., and he forwards moneys received to the creditors (see *supra,* pp. 11-12, and I-A 80-82, 88-91; I-B 307-08, 386, 389, 393, 396-7, 420).

Under similar circumstances the court, in *National Clearance Bureau* v. *Federal Trade Commission,* 255 F. 2d 102, 103 (3d Cir. 1958), held that a contention that the petitioner

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ports the Commission's position. In *Bunte,* the Commission was held to lack jurisdiction because Bunte's sales of its "break and take" packages of candy were wholly within the estate of Illinois. Here, Floersheim's sales admittedly are in interstate commerce.

[12] *Accord, Goodman* v. *Federal Trade Commission,* 244 F. 2d 584, 591 (9th Cir. 1957); The *Regina Corp.* v. *Federal Trade Commission,* 322 F. 2d 765, 768 (3d Cir. 1963); *C. Howard Hunt Pen Co.* v. *Federal Trade Commission,* 197 F. 2d 273, 281 (2d Cir. 1952).

was not engaged in interstate commerce was "so wholly lacking in merit as to require no detailed discussion." *Accord, Rothschild* v. *Federal Trade Commission,* 200 F. 2d 39, 42 (7th Cir. 1952); *Bernstein* v. *Federal Trade Commission,* 200 F. 2d 404 (9th Cir. 1952).

I. The Commission's findings that petitioner's forms are misleading and have the tendency and capacity to deceive are supported by substantial evidence.

The Commission's evaluation of Floersheim's forms should be affirmed on the basis of well-established principles which have been recognized and applied by this Court. Commission findings, if supported by substantial evidence, are conclusive. The meaning of the forms and their tendency or capacity to mislead or deceive are questions of fact to be determined by the Commission which should be upheld by the Court unless clearly wrong.[13] The Commission may draw its own inferences from an examination of the forms themselves. It need not call witnesses who have been deceived. The question is the impression given by the forms as a whole; if they are capable of two meanings, one of which is false, they are misleading. If they can create a false impression, though literally true, they may be prohibited. It is immaterial that relatively trained or experienced individuals would not be misled. That some members of the public, which includes the ignorant, the unthinking and the credulous, may be deceived is sufficient to support the Commission's order.[14] Actual deception need

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[13] As stated by this Court in *Stauffer Laboratories, Inc.* v. *Federal Trade Commission,* 343 F. 2d 75, 78 (1965), "We cannot hold erroneous the Commission's finding as to what the advertisements stated and represented even if we were inclined to disagree with the Commission, which we are not."

And as held in *De Gorter* v. *Federal Trade Commission,* 244 F. 2d 270, 273 (9th Cir. 1957), Commission findings supported by substantial evidence "are final *even though the evidence is so conflicting that it might have supported the contrary had such findings been made*" (Court's emphasis).

[14] In *Feil* v. *Federal Trade Commission,* 285 F. 2d 879, 887 n. 18 (9th Cir. 1960), this Court quoted with approval from *Aronberg* v.

not be shown, only the tendency or capacity to deceive. *Stauffer Laboratories, Inc.* v. *Federal Trade Commission,* 343 F. 2d 75, 78-80, 83 (9th Cir. 1965); *Feil* v. *Federal Trade Commission,* 285 F. 2d 879, 882-4, 887, 892 n. 19, 896 (9th Cir. 1960); *Mohr* v. *Federal Trade Commission,* 272 F. 2d 401, 405 (9th Cir. 1959), *cert. denied,* 362 U.S. 920 (1960); *Carter Products, Inc.* v. *Federal Trade Commission,* 268 F. 2d 461, 493-96 (9th Cir. 1959), *cert. denied,* 361 U.S. 884 (1959); *Goodman* v. *Federal Trade Commission,* 244 F. 2d 584, 587-88, 600 n. 35, 603-04 (9th Cir. 1957); *De Gorter* v. *Federal Trade Commission,* 244 F. 2d 270, 272, 273, 282 (9th Cir. 1957).

More recently, in *Federal Trade Commission* v. *Colgate-Palmolive Co.,* 380 U.S. 374, 385 (1965), the Supreme Court explained:

> Moreover, as an administrative agency, which deals continually with cases in the area, the Commission is often in a better position than are courts to determine when a practice is "deceptive" within the meaning of the Act. This Court has frequently stated that the Commission's judgment is to be given great weight by reviewing courts. This admonition is especially true with respect to allegedly deceptive advertising since the finding of a § 5 violation rests so heavily on inference and pragmatic judgment.

And in applying this principle to the question of whether television commercials made a particular representation, the Court stated (380 U.S. at 386):

Federal Trade Commission, 132 F. 2d 165, 167 (7th Cir. 1942), that "The law is not made for experts but to protect the public,—that vast multitude which includes the ignorant, the unthinking and the credulous, who, in making purchases, do not stop to analyze but too often are governed by appearances and general impressions."

And in *Stauffer Laboratories, Inc.* v. *Federal Trade Commission, supra,* note 13, at 83, this Court stated, "We think it sound doctrine to say that 'If the Commission * * * thinks it best to insist upon a form of advertising clear enough so that, in the words of the prophet Isaiah, "wayfaring men, though fools, shall not err therein," it is not for the courts to revise its judgment.' *Aronberg* v. *Federal Trade Commission,* 7 cir., 132 F. 2d 165."

> * * * and, since this is a matter of fact resting on an inference that could reasonably be drawn from the commercials themselves, the Commission's finding should be sustained.

Floersheim's brief affords undue weight to the examiner's analysis of the documents in question and relies upon the examiner's findings as though they were under review by this Court (see Pet. Br. 9, 11-13, 22-24, 28). To the contrary, it is the Commission's findings that are under review, not those of the examiner. *Folds* v. *Federal Trade Commission,* 187 F. 2d 658, 660 (7th Cir. 1951); *Bond Crown & Cork Co.* v. *Federal Trade Commission,* 176 F. 2d 974, 979 (4th Cir. 1949). Notwithstanding any difference between the Commission and the examiner, the Commission's findings, if supported by substantial evidence, are conclusive. *Universal Camera Corp.* v. *National Labor Relations Board,* 340 U.S. 474, 496 (1951); *Art National Manufacturers Dist. Co.* v. *Federal Trade Commission,* 298 F. 2d 476, 477 (2d Cir. 1962), *cert. denied,* 370 U.S. 939 (1962), relying in part on *Goodman* v. *Federal Trade Commission,* 244 F. 2d 584, 601 (9th Cir. 1957); *accord, United States Retail Credit Association, Inc.* v. *Federal Trade Commission,* 300 F. 2d 212, 216-7 (4th Cir. 1962).

While the Supreme Court in *Universal Camera, supra,* held that the examiner's findings are to be considered, it stated that "The significance of his report, of course, depends largely on the importance of credibility in the particular case." Here, where the Commission's findings are based upon its own examination and evaluation of the forms (I 251), inconsistent findings by the examiner are of no particular significance.[15]

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[15] *Mannis* v. *Federal Trade Commission,* 293 F. 2d 774, 776 (9th Cir. 1961). While Floersheim relies upon the examiner's evaluation that he was an honorable person who did not intend to violate the law (Pet. Br. 26-7), Floersheim's good or bad faith is immaterial in determining whether representations are false or deceptive. *Feil* v. *Federal Trade Commission,* 285 F. 2d 879, 896 (9th Cir. 1960); *The Regina Corp.* v. *Federal Trade Commission,* 322 F. 2d 765, 768 (3d Cir. 1963); *Koch* v. *Federal Trade Commission,* 206 F. 2d 311, 317 (6th Cir. 1953).

A. ***There is substantial evidence to support the Commission's findings that petitioner's Payment Demand forms have the tendency and capacity to mislead and deceive recipients into believing that they come from the government or from some other official source or third party, rather than from the creditor.***

Payment Demand forms (CX 5-25) constitute the bulk of Floersheim's sales and are stressed in his advertising.[16] As Floersheim testified (I 78-79), a Payment Demand form is just what it says—a demand for payment.

The envelopes in which the forms are sent to debtors simulate in appearance and format those used by the United States Government for official purposes. Compare Floersheim's envelopes (CX 23, 23A, 48B) with those of the United States Treasury Department (CX 46).[17] In addition, the envelopes are postage-metered with a blue spread eagle, are sent to Washington, D.C., for mailing so they bear a Washington, D.C., postmark, and carry a Washington Building, Washington, D.C., return address. As established through the testimony of expert and lay witnesses (I 108, 137, 162; I-B 197-9, 212, 217, 221-2, 227-8, 234-5), many persons, particularly those of low income and low educational background, believe that anything from Washington, D.C., is connected with or is from the United States Government.

In *Bernstein* v. *Federal Trade Commission,* 200 F. 2d 404, 405 (9th Cir. 1952), this Court considered the use of a Washington, D.C., address in conjunction with a question-

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[16] Of 2,900,000 forms sold in 1966, slightly over 2,000,000 were Payment Demand—the rest being skip tracer (I-B 417-18). In a form letter advertisement (CX 44A), Floersheim advises, "I am also sure you will prefer these [Payment Demand] to the skip or asset locator forms as they demand payment instead of information."

[17] Floersheim conceded the similarity when he testified (I-B 306-07, 356-57, 410-11) that he had rejected envelopes, otherwise exactly like those he uses, which were the same shade of brown as Treasury Department envelopes because "they looked like the Treasury Department envelope." Floersheim cannot be heard to argue that, because of a slight variation in the shade of brown, his envelopes escape being similar to those of the Treasury Department.

naire "as a sort of clincher for the general implication that the inquiring party is engaged purely in business research or possibly even in the compilation of official statistics." And in *Bennett* v. *Federal Trade Commission,* 200 F. 2d 362 (D.C. Cir. 1952), the court also recognized the tendency of a Washington, D.C., address to imply a connection with the United States Government.[18] Here, the correspondence not only comes from Washington, D.C., but from the "Washington Building" itself. Still another factor is that most of the forms currently being used approximate the green color of United States Government checks. The portion of the green card on which the debtor's name and address is typed shows through the envelope window as does the payee portion of a government check (I-A 86; I-B 374. See CX 6, 9, 11, 13, 15, 15A, 16, 22).[19] Also on the envelope is the legend:

> The Form Enclosed Is
> Confidential
> No One Else May Open

This directive adds weight to the implication that the sender is the United States Government, or at least an official source with authority to impose the limitation.

The forms themselves (CX 10-19, 22) generally are headed:

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[18] See also *National Clearance Bureau* v. *Federal Trade Commission,* 255 F. 2d 102 (3d Cir. 1958), where the court affirmed Commission findings in Docket 6648, 54 F.T.C. 509, 514-5, 523 (1957), to the effect that use of a Washington, D.C., mailing address, *inter alia,* implies that forms emanate from an agency of the United States Government.

[19] Persons of low income frequently receive Internal Revenue refund checks because of their low income (I-A 135). Many poor people have various claims against the government, *e.g.,* workmen's compensation and disability benefits (I-A 138).

PAYMENT DEMAND
748 WASHINGTON BUILDING
WASHINGTON, D.C.[20]

On others (CX 20, 21) it is stated:

Payment Demand
748 Washington Bldg.
Washington 5, D.C.

Reqnests Your Appearance in the office of the creditor at the time specified.

In addition, most of the forms (CX 5-16, 19) prominently state:

NOTICE MAILED FROM WASHINGTON, D.C.
BY PAYMENT DEMAND

The forms, therefore, continue and enlarge upon the deception initially created by the envelopes by emphasizing that the demand for payment comes from Washington, D.C., and is made by Payment Demand. Under the circumstances, Payment Demand may be understood to be a part of the governmental complex in Washington or to be an official authority. Even to persons who might not be so misled, the form clearly represents that a third party, Payment Demand, is interested in the debt and in its collection.

The tendency to mislead and deceive recipients into believing that the forms emanate either from the United States Government or an official source is further accomplished by the authoritative and peremptory nature of the statements and demands contained therein.[21]

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[20] On some forms (CX 5-9) the heading varies to read:

Mailed from:
PAYMENT DEMAND
WASHINGTON 5, D.C.

[21] Floersheim's own sales literature (CX 40A) states that "Each form is designed as a directive to your debtor to come into your office and make arrangements to pay his obligation—or by mail."

The very designation of the forms as "directives" concedes that there is an implication the sender has authority to so direct.

On all forms the recipient is formally termed "Debtor" (CX 5-21) and, in elaborate black letter or Gothic form type which simulates legal documents, some forms are entitled "Final Demand for the Payment of Debt" (CX 10-16, 18, 19, 21). The debtor is ordered to pay the debt or appear in the creditor's office as though this were the authoritative judgment of Payment Demand. Thus we find such directives as:

> Take Notice That the AGENT (CREDITOR) OR ASSIGNEE—claims a just indebtedness from the DEBTOR ——— TO BE PAID on or before ——— (CX 15, 16).[22]
>
> The above amount is correct and payable.
> The addressee must bring (mail) this form to the Creditors Office located ——— prepared for settlement. Settlement date only extended to —— (CX 17, 20, 22).
>
> You have 10 days to pay the amount of $—— on the claim of ——. You are scheduled to appear in the CREDITORS (AGENTS) OFFICE located at —— on or before —— to pay the balance requested or give satisfactory reasons in PERSON why the AMOUNT has not been paid (CX 5-9, 15, 16).
>
> The Addressee must bring this form to the Creditors (Agent's) Office located at —— on or before —— to pay the balance or give satisfactory reasons in PERSON why the AMOUNT has not been paid (CX 10-13).
>
> THE DEBTOR (or Addressee) MUST BRING OR MAIL THIS FORM TO THE CREDITOR'S (or ASSIGNEE'S) OFFICE located at —— on or before —— (CX 14, 18, 21).[23]

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[22] Others (CX 10-13, 18, 19, 21) simply state: "Take Notice that the above named Creditor (Agent) claims a just indebtedness from (DEBTOR)."

[23] Still additional examples of absolute directives are:

"Bring this form with you. If unable to apear, send amount past due by mail to creditor's (agent's) (assignee's) office" (CX 5-13, 15-19, 21).

These illustrative excerpts from the Payment Demand forms, many of which are in the elaborate black letter, Gothic form type used in legal documents (see, *e.g.*, CX 10-16, 18-20), represent that Payment Demand, with governmental or other official authority to do so, has passed upon the creditor's claim and, finding it to be a "just indebtedness," "correct and payable," has adjudged that the debtor must make payment or appear before the creditor to make alternative arrangements. Indeed, Payment Demand is represented to have such absolute authority that Floersheim has prepared forms (CX 20, 21) with "Debtor's Stubs" on which the creditor is to provide the debtor with a certification that the debtor did appear at the creditor's office as required.

Floersheim has admitted (I-A 82-3; I-B 313-4, 421) that it is his intention that the debtor believes he is receiving something from a party other than the creditor. Proof that debtors do believe that a third party is interested in the debt and its payment is the fact that some debtors respond to the forms by making payment directly to Payment Demand in Washington (I-A 90-1). Indeed, so many recipients respond directly to Payment Demand as the party in interest that Floersheim sells follow-up forms for creditors to mail to the debtors in such situations. These forms continue and exploit the deception.[24] And see CX 54, where the credi-

"IF MAILING PAYMENT, YOU MUST REFER TO FILE NO. ——. IF APPEARING IN PERSON, BRING THIS FORM WITH YOU" (CX 14).

"SEND AMOUNT PAST DUE BY MAIL TO CREDITORS OFFICE Complete questionnaire on reverse side unless full payment enclosed"

And on the reverse side is:

"All answers must be current and must be printed and returned at once" (CX 22).

"DO NOT PIN FOLD OR STAPLE" (CX 5-14, 17-19, 21, 22). This directive indicates that the form is important and must be returned in proper condition.

[24] One such form (CX 24) reads:

"YOUR LETTER TO PAYMENT DEMAND, WASHINGTON, D.C. PROMISING PAYMENT, HAS BEEN FORWARDED TO

tor wrote the debtor that if he had made his payments as promised "it would not have been necessary to resort to the *legal notice from Washington*" (emphasis supplied).[25]

The tendency and capacity to deceive, apparent from the forms and envelopes themselves, is sufficient upon which to predicate a holding of violation (*supra*, pp. 18-19). While not required, the record also contains testimony of recipients who were deceived into believing that the demands for payment came from the United States Government or from a third party collection agency.[26]

THIS OFFICE. YOUR AGREEMENT IS ACCEPTABLE ONLY IF RECEIVED AT THIS OFFICE AT THE ADDRESS BELOW ON OR BEFORE ——."

The other (CX 25) is as follows:

"TAKE NOTICE . . .

"YOUR LETTER TO PAYMENT DEMAND, WASHINGTON, D.C., PROMISING PAYMENT WAS ACCEPTED BY THIS OFFICE.

"YOUR FAILURE TO KEEP UP YOUR AGREEMENT FORCES US TO DEMAND PAYMENT FROM YOU IN THE AMOUNT OF $—— TO BE PAID IN PERSON OR MAILED TO THE ABOVE OFFICE ON OR BEFORE —— OTHERWISE WE MUST PROCEED WITHOUT FURTHER NOTICE....."

[25] The tendency and capacity of the Payment Demand forms to mislead and deceive is further revealed by Floersheim's own advertising brochure (CX 40). Here he attempts to counter reasons that have been presented to him for not using the forms, *inter alia*, "THEY SIMULATE A LEGAL DOCUMENT"; "THEY ARE ILLEGAL"; "THEY MISQUOTE OUR STATE LAWS" (see discussion of this deception, *infra*, pp. 27-29); "WE DON'T BELIEVE IN THIS KIND OF PRACTICE."

The very fact that creditors have so questioned the forms conclusively demonstrates their tendency and capacity to mislead and deceive the relatively unsophisticated recipients, many of whom are uneducated and would fall into the category of ignorant, unsuspecting and credulous that the Federal Trade Commission Act was passed to protect (see *supra*, pp. 18-19).

[26] Manuel Gonzalez thought, from the Washington address and the form itself, that it was from the United States Government and that the Government was telling him he owed it $1200. Even after a Legal Aid attorney explained that this was not from the Government, Gonzalez returned with an income tax refund form to prove

In *In re Floersheim,* 316 F. 2d 423, 428 (9th Cir. 1963), this Court discounted Commission complaints that the skip tracer forms there considered [27] were too official-looking, simulated the color and design of checks and used peremptory language and a Washington, D.C., address. That case, however, was an action for criminal contempt where the sole issue was whether Floersheim had willfully violated an outstanding order to cease and desist. As this Court stated (316 F. 2d at 428):

> * * * The short answer to these complaints is that the cease or desist order, as drawn, does not forbid such acts or use.

This Court, therefore, was not passing upon the tendency and capacity of such acts and practices to mislead and deceive, but held only that they did not violate the outstanding order. And see *Bernstein* v. *Federal Trade Commission,* 200 F. 2d 404, 405 (9th Cir. 1952), where this Court affirmed a finding of deceptiveness in connection with the use of a Washington, D.C., address.

Most Payment Demand forms (CX 5-16) contain the statement:

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he did not owe the Government any money. And at the time of the hearing, he still thought it was a court requirement (I-A 144-8, 155-6; I-B 195-6).

Mrs. Yvonne Miller thought that the Payment Demand form she received was from a collection agency (I-A 143, 157-8).

Christopher Gonzalez thought that the Government was demanding that he pay his bill, and that if he did not, they would take away his furniture and car. His wife, Elida Gonzalez, also read the demand and told him that it was very important because it came from Washington and so they were required to pay. She thought it was a requirement to appear in court within ten days (I-B 208-12, 217, 221-28).

Richard Blackley, a school teacher, at first thought that it was from the United States Government, probably a GI insurance check. It was only after he read the form that he realized it was a demand to pay a bill (I-B 232-40). Clearly, a less educated person might have continued to believe that the form was from the Government.

[27] Petitioner's Payment Demand forms were not covered by the order to cease and desist and were not involved in the case.

> Subject to the Laws of the (name of appropriate state).
>
> A Creditor may request an Attorney-at-Law to attach (after Judgment) (before Judgment) Property such as Automobile, Jewelry, Boat, Live Stock, Crops, Machinery, House, Real Estate, Bank Account, Bank Vault, Stocks, Bonds and Earnings, Commission or Salary.

As the Commission found (I 257):

> It is not disputed that [petitioner's] forms are sent to debtors in all parts of the United States. Yet, as exhibit 56, a summary of various state laws, demonstrates, the general statement on [petitioner's] forms fails to take into account numerous variations in state law, for example, providing exemptions for particular kinds of property or imposing limitations on wage or salary attachments. * * *
>
> It seems clear that the sole purpose of including this catalog of creditors' rights is to intimidate and deceive the debtor, rather than to inform him of the legal rights of his creditor. Certainly any statement of a creditor's rights after judgment sent to a debtor against whom no judgment has yet been entered should include a notification that no judgment may be entered against the debtor unless he has first had an opportunity to appear and defend himself in a court of law.

While Floersheim's brief to this Court does not take issue with this finding, and thus waives any objection thereto,[28] this deceptive statement may be considered in connection with the other deceptive characteristics of the forms. The propensity to intimidate and deceive debtors as to the legal rights of their creditors is particularly strong since the statement is on a form that simulates a legal

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[28] *Dower* v. *United Air Lines, Inc.*, 329 F. 2d 684, 685 (9th Cir. 1964); *Chain Institute, Inc.* v. *Federal Trade Commission*, 246 F. 2d 231, 235 (8th Cir. 1957), *cert. denied*, 355 U.S. 895 (1957); *Donnelly* v. *United States*, 276 U.S. 505, 511 (1928).

notice or demand (often captioned "Final Demand for the Payment of Debt") from a governmental or other official source, which purportedly has passed judgment that the indebtedness is "just" or "correct and payable." Further, the forms prominently state:

> This Demand is made to give you a last opportunity to pay and to lay a foundation for action on said claim if the same is not paid within the time aforesaid (CX 10-13, 18, 19, 21).

or

> This Demand is made to give you a last opportunity to pay before action is taken on said claim (CX 5-9, 15, 16).[29]

Under the circumstances, the recipient may well believe that the formal Demand for payment constitutes the requisite legal action which lays the foundation, without more, for attachment of his property.[30] The overly broad statement of state law clearly tends to intimidate and deceive.[31]

B. ***There is substantial evidence to support the Commission's finding that petitioner's skip tracer forms have the tendency and capacity to mislead and deceive recipients into believing that they come from the government or from some other official source, rather than from the creditor.***

The purpose of the skip tracer forms is to secure information about debtors, *e.g.*, location, place of employment, where they bank (I-A 88, 90). These forms (CX 27-36; I-A

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[29] An additional variation is: "Take Notice that the Creditor or Assignee makes this Demand to give you a last oportunity to pay and to lay a foundation on said claim, if same is not paid within the time aforesaid" (CX 14).

[30] As a representative recipient testified, his wife explained to him that "it said we had to pay that money or they would take away the furniture, the car" (I-B 212).

[31] As noted *supra*, p. 26, n. 25, even some of petitioner's prospective customers object that the forms "MISQUOTE OUR STATE LAWS!"

78-9) are mailed to the debtors or to other parties who may possess desired information (I-A 90, 388, 393).

The same type brown window envelopes in which Payment Demand forms are sent are used to mail skip tracer forms. The forms are similarly completed by the creditor and are sent to Floersheim for mailing from Washington, D.C., to the debtor or other source of information (I-A 88-9; I-B 301-2, 388, 393). Skip tracer forms are available in green so that again the color of a government check may show through the envelope window (CX 30, 34). Thus, all of the deceptive and misleading elements involved in mailing Payment Demand forms are present in mailing skip-tracers. The recipient is led to believe that he is receiving a communication from the United States Government or from some other official source in Washington, D.C. (See *supra*, pp. 21-22, for analysis of the deceptive elements).

The brown return envelopes Floersheim provides for the addressees' use in sending back the completed skip tracer forms are similarly misleading. Addressed as they are to Change of Address, Current Employment Records, or Claimant's Information Questionnaire, 748 Washington Building, Washington 5, D.C., they clearly imply that the recipients are responding to a branch of the United States Government or some other official party in Washington.[32]

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[32] Floersheim's allusion (Pet. Br. 7, 12) to alleged Post Office Department approval of these names is not material. Before the Commission, petitioner conceded that he did not know the criteria used by the Post Office in giving such approval and that this would not be binding on the Commission (I-B 389-92; Oral Argument before Commission, pp. 32-34—reproduced at rear of I-B). Not having been raised before the Commission, the question should not be entertained by this Court. *Moog Industries, Inc.* v. *Federal Trade Commission*, 355 U.S. 411, 413-4 (1958); *United States* v. *L. A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 36-7 (1952); *De Gorter* v. *Federal Trade Commission*, 244 F. 2d 270, 272 (9th Cir. 1957).

In any event, Post Office Department determinations do not preclude Federal Trade Commission action, since the agencies act under different statutes employing different standards. *Brandenfels* v. *Day*, 316 F. 2d 375, 378 (D.C. Cir. 1963), *cert. denied*, 375 U.S. 824 (1963). See also *Charles of the Ritz Dist. Corp.* v. *Fed-*

The deception is also present in the skip tracer forms themselves. They all prominently stress the 748 Washington Building, Washington, D.C., address (CX 27, 29-34, 36). They are designated "Questionnaire" (CX 31-34) or "Claimant's Information Questionnaire" (CX 36) and all peremptorily demand that the recipient furnish the requested information. Thus, all skip tracer forms (CX 27, 29-34, 36) require:

> All answers must be current and must be printed and returned at once.

Other peremptory demands for information include:

NOTICE YOU HAVE CHANGED EMPLOYERS

COMPLETE QUESTIONNAIRE AND RETURN TO 748 WASHINGTON BLDG. WASHINGTON, D.C. (CX 32, 33, 34)

This office has been advised that you failed to answer the original request—Answers must be kept current—

ANSWER ALL QUESTIONS BELOW

Give reason here why first form was not returned as requested

(CX 33, 34)

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eral Trade Commission, 143 F. 2d 676, 678 (2d Cir. 1944); *L. Heller & Son, Inc.* v. *Federal Trade Commission,* 191 F. 2d 954, 956 (7th Cir. 1951); *Waltham Precision Instrument Co.* v. *Federal Trade Commission,* 327 F. 2d 427, 430-31 (7th Cir. 1964), *cert. denied,* 377 U.S. 992 (1964); *W. M. R. Watch Case Corp.* v. *Federal Trade Commission,* 343 F. 2d 302, 304-5 (D.C. Cir. 1965), *cert. denied,* 381 U.S. 936 (1965).

CAUTION

THE QUESTIONS BELOW CANNOT BE ANSWERED BY ANYONE OTHER THAN ADDRESSEE (CX 36).

Fill Out Reverse Side of This Form and Return Within 5 Days (CX 27, 31).[33]

The heading of the "Claimant's Information Questionnaire" form (CX 36) is in the same black letter or Gothic type which simulates a legal document as used on Payment Demand forms (see *supra,* p. 24). In addition, the title appears in an elaborately scrolled black frame, and the form directs: "FILL IN THIS FORM FOR IDENTIFICATION AND TO AID COLLECTION IN FULL FOR CLAIMANT." The claimant's name is not given. The only name on the form is the debtor's and he is directed to furnish his address, social security number, date of birth, spouse's name, bank references and his employer's name and address. The debtor, therefore, might well believe he is the "claimant" and that the information is required to identify himself as the one entitled.[34]

The other skip tracer forms require similar information. See *Bernstein* v. *Federal Trade Commission,* 200 F. 2d 404,

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[33] Some of the other directives are:

"DO NOT PIN, FOLD, STAPLE OR MUTILATE" (CX 32-34).

This directive accentuates the authoritative source of the demand by implying that the recipient is obliged not to destroy the form, but must complete and return it intact. (See also CX 27, 29, 30).

"Addressee Complete Reverse Side" (CX 29, 30).

"ANSWER ALL QUESTIONS ON REVERSE SIDE OF THIS FORM" (CX 32-4).

[34] As explained by an attorney with the California Legal Assistance Office who worked extensively with poor people of limited education, many such persons have various claims against the government (*e.g.,* workmen's compensation, social security) and the information called for by CX 36 is similar to that required in these other situations (I-A 120-23, 132, 138).

405 (9th Cir. 1952), where this Court held that questionnaires seeking this type of data implied that the inquiring party was engaged in business research or in compiling official statistics, an implication that was "clinched" by the Washington, D.C., address.

While individual illustrative elements of deception have been demonstrated above, each of Floersheim's forms contains various combinations of these elements which make it even more deceptive. The Claimant's Information Questionnaire, for example, in addition to the particulars just recited, also has the Washington Building, Washington, D.C., heading and directs: "CAUTION. THE QUESTIONS BELOW CANNOT BE ANSWERED BY ANYONE OTHER THAN ADDRESSEE"; and "All answers must be current and must be printed and returned at once."

Similarly, the brown window envelopes, the return envelopes and the various skip tracer forms are not only individually misleading and deceptive, but the combinations in which they are used make the deception even more inevitable.[35] Clearly, as the Commission found (I 252), they "combine to conceal the true purpose of the request for information."

Florsheim asserts (Pet. Br. 5, 10-11, 13) that his skip tracer forms are not deceptive because they contain the statement, "The purpose of this card is to obtain information concerning a delinquent debtor, and to further advise that this is not connected in any way with the United States Government."

This, however, is in small print, much smaller than the peremptory demands and other misleading matter on the cards,[36] and is sandwiched between other statements so as to be inconspicuous (see, *e.g.*, CX 27, 29, 36). As the Commission found (I 252), the forms are often sent to persons

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[35] This is also true of the combination of Payment Demand forms and envelopes in which they are sent (*supra*, pp. 21-25).

[36] Floersheim is in error in asserting (Pet. Br. 15) that the disclaimer is in as large print as anything else on the form except the form designation, the word "Notice" and, in some instances, the return address.

of low income having minimal formal education who "would be unlikely to notice [Floersheim's] inconspicuous disclaimer or to understand its import." (See I-A 136).

The statement clearly is insufficient to undo the overall deception of the forms and envelopes. Indeed, even if read, it does not disavow that the forms come from some official source. Further, the disclaimer is so worded and placed that, as exemplified by the experience of Mrs. Mossberg, creditors can easily block out everything from the disclaimer other than the words "United States Government" (See I-A 100-06, CX 48A).

Petitioner's reliance (Pet. Br. 14) upon this Court's discussion of the disclaimer in *In re Floersheim,* 316 F. 2d 423, 427 (1963), is misplaced. This Court did not hold that the disclaimer served to make the forms nondeceptive; it held only that the language used did not violate the Commission's order to cease and desist in Docket No. 6236. The Court went on to say (316 F. 2d at 428):

> If the Federal Trade Commission's order is insufficient, then that body should reopen proceedings and modify its order. But such modification procedure, or its advisability, is not now before us.

As Floersheim's counsel has conceded, the necessary size of a disclaimer is a matter of judgment.[37] And the Commission did not abuse its judgment in holding that a disclaimer sandwiched between other material, and in much smaller print than the deceptive statements in the forms, failed to overcome the overall deception. See *Double Eagle Lubricants, Inc.* v. *Federal Trade Commission,* 360 F. 2d 268, 271 (10th Cir. 1965), where the court held that the

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[37] "MR. CHOTINER: * * * we have no objections to there being a disclaimer. * * * We have no objections to a disclaimer, except as a practical matter, what size shall it be? We have no objections to increasing the size of the disclaimer. We think it is large enough. * * * Where we draw the line becomes just a matter of judgment. That is the only thing" (Oral Argument before Commission, p. 27—reproduced at rear of I-B).

Commission's judgment that the particular placing of a disclaimer "is not sufficiently conspicuous" was a matter of expertise within the Commission's discretion not subject to judicial revision. And see *Independent Directory Corp.* v. *Federal Trade Commission,* 188 F.2d 468, 469-70 (2d Cir. 1951), and *Parker Pen Co.* v. *Federal Trade Commission,* 159 F. 2d 509, 510-11 (7th Cir. 1946).[38]

II. Petitioner received adequate notice that he was being charged with misrepresenting that a third party, unrelated to the creditor, was interested in the debt or in its collection.

The complaint (I 2-5) details Floersheim's method of doing business, including the use of the name "Payment Demand," the Washington, D.C., mailing address, and the prominent statement "Notice mailed from Washington, D.C. by Payment Demand." It also alleges that no creditor to whom the forms are sold has his place of business at the Washington, D.C., mailing address, and that Floersheim's sole business is that of selling forms to others for their use in securing information and collecting debts. The complaint, therefore, clearly sets forth the facts of a "third party" misrepresentation, *i.e.,* that Payment Demand, a party other than the creditor, has an interest in the debt or in its collection.

The conclusionary pleadings also encompass the "third party" issue by alleging generally that Floersheim fur-

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[38] In *Independent Directory Corp.,* the court affirmed a Commission finding that certain order blanks were deceptive notwithstanding the inclusion of statements that revealed the truth.

In *Parker Pen Co.,* the court upheld the finding that "guaranteed for life" in an advertisement was deceptive as indicating a lifetime guarantee without any cost notwithstanding the inclusion, in a less prominent place on the page and in smaller print, of the condition that the owner pay a 35-cent service charge. In holding that it could not, as a matter of law, state that the Commission was arbitrary in finding that an inattentive or casual reader might be misled, the court relied upon the analogy that many States require that any limitation of liability in an insurance policy must be given equal prominence to the statement of liability.

nishes purchasers of the forms with the false, misleading and deceptive means of securing payment of delinquent accounts by subterfuge, in that use of the forms has the tendency and capacity to mislead and deceive persons to whom they are sent and to induce them to perform acts which they might not otherwise have done (I 5-6).

Not only does the complaint encompass the "third party" charge, but complaint counsel consistently took this position (I-A 19-20, 27, 32-35; I-B 325-26). Even the examiner, who ultimately held that the charge was not included, felt that the facts which were alleged covered such a practice (I-A 20, 25-6, 29-30) and warned petitioner that, in his opinion, the Commission could and probably would find this to be one of the issues (I-A 25, 36).

Floersheim's counsel at the very outset, during a prehearing conference, expressed his understanding of complaint counsel's position, stating, "I understand it clearly what Mr. Pope is proceeding on" (I-A 20), and he recognized that this was an issue to be determined by the examiner, the Commission and ultimately by the Courts (I-A 28, 31).[39] He stated that he would "not be taken by surprise" (I-A 36) and that "we are prepared to meet the issue even if we were to proceed to trial today, so we will not be surprised" (I-A 39). Indeed, he introduced evidence for the avowed purpose of defending against such a charge in the event it might ultimately be held that it was included.[40]

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[39] Floersheim's counsel unequivocally stated (I-A 31): "So there will be no misunderstanding about our contention in this regard I recognize that the Examiner may find, and the Commission may find and even the Court may find that the issue is raised regarding a third party mailing, as to whether it is permitted and that is raised by virtue of whatever pleadings are before the Examiner."

[40] "HEARING EXAMINER KAUFMAN: * * * Do I understand that this testimony that you've adduced as to third party representation where Dun & Bradstreet is used—the name is used —is that offered as a defense against such a charge if it is contained in the Complaint, third party representation?

"MR. CHOTINER: It is offered in reply to such a charge if it is determined that there is encompassed within the pleadings the issue of third party mailings and alleged representations of third

It is well settled that administrative complaints need not meet the relatively strict standards required in court proceedings. *A. E. Staley Manufacturing Co.* v. *Federal Trade Commission,* 135 F. 2d 453, 454 (7th Cir. 1943). There is no fatal variance between the complaint and the proof and findings where the practice objected to, though not particularly pointed up, falls within the thrust of the complaint. *Continental Wax Corp.* v. *Federal Trade Commission,* 330 F. 2d 475, 478-9 (2d Cir. 1964). As stated in *Armand Co.* v. *Federal Trade Commission,* 84 F. 2d 973, 974-5 (2d Cir. 1936), *cert. denied,* 299 U.S. 597 (1936):

> At least in a contested case there must be an entire abandonment of the very substance of the dispute to which the defendant was summoned, and the substitution of another which he could not have anticipated, and which he had no opportunity to meet.

Here, there was no abandonment or substitution of issues. It is basically the same deception that "Payment Demand" is insisting upon payment, regardless of whether "Payment Demand" be deemed a part of the United States Government, another official authority, or simply a third party, other than the creditor, who is interested in the debt and its collection. Petitioner was at all times aware that it might be held that the "third party" issue was included and petitioner introduced the evidence he felt was appropriate to refute the charge.[41] Further, since the evidence sup-

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party interests, so that we have not been foreclosed. In other words, it's our contention and position, first, that the issue of third party mailing or third party representation of interest in the subject is not encompassed within the pleadings, but we do offer the evidence so that if the ruling should be adverse to our contention there will be evidence in the record" (I-B 324-5).

The examiner summarized the matter, without objection by petitioner, as follows (I-B 326): "All right. Then I know where we are. The Commission contends there is such an issue as to third party representation; the [Petitioner] contends there isn't, but [Petitioner], nevertheless, is adducing evidence to meet it."

[41] See *Tri-Valley Packing Association* v. *Federal Trade Commission,* 329 F. 2d 694, 699-700 (1964), where this Court held that

porting the findings of "third party" misrepresentation was clearly admissible in support of the other charges, and petitioner was given full opportunity to meet the alleged expanded charge, there can be no prejudice. See *J. B. Williams Co.* v. *Federal Trade Commission,* 381 F. 2d 884, 888 (6th Cir. 1967); *Federated Nationwide Wholesalers Service* v. *Federal Trade Commission,* 398 F. 2d 253, 258 (2d Cir. 1968).

III. The Commission was not estopped from issuing its complaint with regard to petitioner's unfair and deceptive acts and practices.

There is no merit to Floersheim's assertion (Pet. Br. 34-8) that the Commission's rules require that it can question Floersheim's conduct only by reopening the prior proceedings,[42] and that it should be estopped from proceeding under the subsequently issued complaint. As the Commission observed (I 248-9):

> * * * The Commission's choice of procedure would seem to be a matter of indifference to [petitioner], since no substantial rights of his could possibly be impaired thereby. Under either procedure [petitioner] would be, and is, entitled to a full evidentiary hearing to resolve disputed issues of fact and law, to a decision based on the record, and to judicial review of the Commission's decision in an appropriate court of appeals. More particularly, the procedure chosen by the Com-

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even if the Commission's findings enlarged the scope of injury caused by a particular practice beyond what was charged in the complaint, no prejudice was shown where the petitioner did not apply for leave to adduce pertinent evidence to counter the broader finding. Similarly, here, there can be no prejudice where petitioner was allowed to introduce the evidence he wanted to introduce.

[42] The rule relied upon by Floersheim, in effect when the Commission issued its complaint in this case, imposes no such requirement. It merely recites the Commission's authority to reopen a proceeding and the procedure to be followed. The rule, then Section 3.28 of the Commission's Rules of Practice for Adjudicative Proceedings, 16 CFR 3.28 (Supp. 1967), is reproduced in the addendum to this brief, p. 1a.

> mission entitles [petitioner] to an evidentiary hearing before a hearing examiner whose initial decision must be "based upon a consideration of the whole record and supported by reliable, probative, and substantial evidence," and must include "findings * * * and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record." Rules of Practice, Section 3.51(b). [Petitioner's] right of review both before the Commission and before an appropriate court is also guaranteed. How [petitioner] is, or could be, prejudiced by our choice of this procedure remains a mystery.

And *Floersheim's brief to this Court contains no assertion of prejudice.*

The instant case deals with acts, practices and forms utilized subsequent to the date of issuance of the prior order. The nature of Floersheim's business has shifted to the extent that he now stresses and deals primarily in "Payment Demand" forms, a type of form not involved in the prior case. The prior case dealt solely with skip tracer forms. By 1966, however, over 2,000,000 of some 2,900,000 forms sold were "Payment Demand" forms. Only 766,000 were skip tracer forms (I-B 417-18; CX 44A). A further misrepresentation not involved in the prior case was Floersheim's assertion that the Commission had approved his Payment Demand forms, an aspect of the case not argued in Floersheim's brief.

It is well established that new violations support new proceedings, *Federal Trade Commission* v. *Raladam Co.*, 316 U.S. 149, 152 (1942); *Exposition Press, Inc.* v. *Federal Trade Commission,* 295 F. 2d 869, 872 (2d Cir. 1961); *J. C. Martin Corp.* v. *Federal Trade Commission,* 346 F. 2d 147 (3d Cir. 1965), and the situation is not changed because there is an outstanding order. No greater public interest is required to reopen an order than to bring a complaint in the first place. The function of the Commission is the same in both instances. *Elmo Co., Inc.* v. *Federal Trade*

Commission, 389 F. 2d 550, 551-2 (D.C. Cir. 1967). And see *Double Eagle Lubricants, Inc.* v. *Federal Trade Commission,* 360 F. 2d 268, 269-270 (10th Cir. 1965), and *Exposition Press, Inc.* v. *Federal Trade Commission,* 295 F. 2d 869, 872 (2d Cir. 1961), where orders were sustained which were issued under new complaints notwithstanding prior outstanding orders.

Floersheim's reliance (Pet. Br. 37) upon *Elmo Division of Drive-X Co., Inc.* v. *Dixon,* 348 F. 2d 342 (D.C. Cir. 1965), is misplaced. There, Elmo and the Commission had entered into a consent order *agreement* in 1952 which provided that the consent order could be set aside in whole or in part only under the conditions and in the manner provided in paragraph (f) of Rule V of the Commission's Rules of Practice, then in effect.[43] As explained by the court, 348 F. 2d at 343, that rule "provided for a reopening procedure whereby the Commission could set aside the consent settlement or any severable part thereof on finding a change of law or fact or that the public interest so required, and could *thereafter* undertake corrective action by adversary proceedings under the original or a new complaint as to any acts or practices not prohibited by any remaining provisions of the settlement" (court's emphasis). The court held, 348 F. 2d 345, that the incorporation of the rule into the consent agreement gave Elmo a vested right to the reopening rehearing procedure provided by the rule, before any corrective action could be taken.

Here, unlike the situation in *Elmo,* there was no consent agreement which gave Floersheim a vested right to a reopening procedure, as was provided in the 1952 special rule applicable only to consent agreements. Further, the rule *allowing* reopening of orders such as the one outstanding against Floersheim contains no such requirement.[44] In

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[43] 16 Fed. Reg. 6503 (1951); revoked effective May 21, 1955, 20 Fed. Reg. 3055. See addendum to this brief, p. 2a.

[44] It is significant that, even under the rule applicable in *Elmo,* once the required hearing was held which resulted in a determination to set aside in whole or in part the prior order, the Commission

addition, the present complaint deals, for the most part, with matters not covered by the prior order. The Commission, therefore, in its allowable discretion, determined to issue a new complaint rather than reopen the prior proceedings (see I 249).

Floersheim's recitation (Pet. Br. 35) that the Commission did not revoke its approval of reports of compliance filed pursuant to the prior order to cease and desist has no bearing. Section 3.26(c) of the Commission's former Rules of Practice (now Section 3.61(d); 16 CFR 3.61(d)), upon which Floersheim relies, pertains to Commission action against a respondent *for violation of an order* where a party has acted in reliance upon Commission approval of a report of compliance.[45] It has no application to the issuance of a new complaint which is an action for violation of Section 5 of the Federal Trade Commission Act, not for violation of an outstanding order.[46]

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was free "by adversary proceedings pursuant to the original complaint, or a new or amended and supplemental complaint" to undertake corrective action. (See addendum to this brief, p. 2a).

[45] "The Commission may at any time reconsider its approval of any report of compliance or any advice given under this section and, where the public interest requires, rescind or revoke its prior approval or advice. In such event the respondent will be given notice of the Commission's intent to revoke or rescind and will be given an opportunity to submit its views to the Commission. The Commission will not proceed against a respondent for violation of an order with respect to any action which was taken in good faith reliance upon the Commission's approval or advice under this section, where all relevant facts were fully, completely, and accurately presented to the Commission and where such action was promptly discontinued upon notification of rescission or revocation of the Commission's approval" (16 CFR 3.61(d)).

[46] This is a material difference. An action for violation of an order contemplates "a civil penalty of not more than $5,000 for each violation, which shall accrue to the United States and may be recovered in a civil action brought by the United States" (Federal Trade Commission Act, Sec. 5(l), 52 Stat. 114; 64 Stat. 21, 15 U.S.C. 45(l)); or an action for contempt may be instituted in a court of appeals for violation of its order of affirmance and enforcement. On the other hand, a new complaint may at most culminate in an order

Not only was revocation of the "approval" of the prior reports of compliance unnecessary, but it would have been inappropriate. The first "approval" was a letter from the Commission's Assistant General Counsel for Compliance, who did not purport to speak for the Commission. He merely advised that "in my opinion" the *forms demanding payment,* which were *the only forms submitted* with the report of compliance, "do not violate the Commission's modified order, inasmuch as they do not request any information concerning delinquent debtors" (CX 2; emphasis supplied). The Assistant General Counsel's letter, therefore, did not even constitute his approval of the collection forms, let alone Commission approval.[47]

The second report of compliance upon which Floersheim relies (CX 3A-3QQ) was filed in August 1963, following this Court's holding that various aspects of Floersheim's skip tracer forms challenged by the Commission were not proscribed by the outstanding order to cease and desist. In addition to pertinent skip tracer forms, this report also included some Payment Demand forms. In accordance with this Court's decision, the Commission advised that the

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to cease and desist which does not punish or exact compensatory damages, but is prospective only—being purely remedial and preventative. *Federal Trade Commission* v. *Ruberoid Co.,* 343 U.S. 470, 473 (1952); *Drath* v. *Federal Trade Commission,* 239 F. 2d 452, 454 (D.C. Cir. 1956), *cert. denied,* 353 U.S. 917 (1957).

[47] Rather than constituting a determination that the forms complied with the order or otherwise approving them, this letter clearly advised that the order did not pertain to such forms "as they do not request any information concerning delinquent debtors." The forms submitted simply were not the subject of the order. Mohr and Floersheim could just as well have submitted forms claiming cures for baldness or cancer and then claimed, under a response similar to CX 2, that the Commission had approved such forms and determined that they were in compliance with the order to cease and desist. Even if this letter were deemed to constitute approval by the Assistant General Counsel, the Commission would not be estopped from taking contrary action. *Mohr* v. *Federal Trade Commission,* 272 F. 2d 401, 406 (9th Cir. 1959), *cert. denied,* 362 U.S. 920 (1960); *Double Eagle Lubricants, Inc.* v. *Federal Trade Commission,* 360 F. 2d 268, 270 (10th Cir. 1965).

report set forth actions that complied with the order to cease and desist (CX 4). Again, this did not constitute approval of the Payment Demand forms that were forwarded with the report of compliance and it did not express Commission approval of the skip tracer forms except that they were in compliance with the order to cease and desist as construed by this Court. Indeed, the Commission had already announced its disapproval of the skip tracer forms by instituting the criminal contempt proceeding in this Court. Having lost that case, the Commission was obliged to accept Floersheim's report of compliance.

In issuing its new complaint, the Commission was not changing its mind as to what constituted compliance with the prior order. To the contrary, it was acting to stop practices not covered by that order. Not only was there no need to revoke acceptance of reports of compliance filed under the prior order, but such revocation would have been inconsistent with this Court's decision. And the complaint gave Floersheim full notice of the Commission's position.

IV. The Commission has not abused its discretion in its formulation of an order to cease and desist.

In *Carter Products, Inc.* v. *Federal Trade Commission,* 268 F. 2d 461, 498 (9th Cir. 1959), *cert. denied,* 361 U.S. 884 (1959), this Court stated the Commission's responsibility in formulating an appropriate order to cease and desist, as follows:

> The Commission is the expert body to determine *what remedy* is necessary to eliminate the unfair and deceptive practices disclosed by the record, and it has wide latitude for judgment. Shaping a remedy is essentially an administrative function. Congress has entrusted the Commission with the responsibility of selecting *the means* of achieving a statutory policy—the relation of remedy to policy is peculiarly a matter for administrative competence. Here, the Commission had discretion to fashion a remedy of a civil nature to attain the desired goals, and its choice fell within an allowable

> area of its discretion. Only in cases where the remedy selected has no reasonable relation to the unlawful practices found to exist, should a reviewing court interfere (Court's emphasis).[48]

To be effective, orders to cease and desist may impose a greater burden than the precise scope of violations. "[T]hose caught violating the Act must expect some fencing in." *Federal Trade Commission* v. *National Lead Co.*, 352 U.S. 419, 431 (1957). "If the Commission is to obtain the objectives Congress envisioned, it cannot be required to confine its road block to the narrow lane the transgressor has traveled; it must be allowed effectively to close all roads to the prohibited goal, so that its order may not be by-passed with impunity." *Federal Trade Commission* v. *Ruberoid Co.*, 343 U.S. 470, 473 (1952).

These principles conclusively dispose of Floersheim's efforts (Pet. Br. 21-22, 27-28) to limit the order to the specific forms used in the past, and are particularly pertinent in the present case. When the original order to cease and desist was issued, Floersheim construed it so narrowly that the Commission was impelled, in the public interest, to modify it in order to stop the continued tendency of his skip tracer forms to mislead and deceive (see *supra*, p. 2, and *Mohr* v. *Federal Trade Commission*, 272 F. 2d 401, 404-05 (9th Cir. 1959), *cert. denied*, 362 U.S. 920 (1960)). After the modified order was affirmed by this Court, Floersheim changed the emphasis of his business to Payment Demand forms which were not covered by that order (*supra*, p. 39). While absolved from criminal contempt with respect to his skip tracer forms, Floersheim came so close to the line that this Court "hazard[ed] the hope that [Floersheim would] take such a long step forward in voluntary compliance with

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[48] See *Federal Trade Commission* v. *Mandel Brothers, Inc.*, 359 U.S. 385, 392-93 (1959); *Federal Trade Commission* v. *Ruberoid Co.*, 343 U.S. 470, 473-74 (1952); *Federal Trade Commission* v. *National Lead Co.*, 352 U.S. 419, 428-29 (1957); *Mannis* v. *Federal Trade Commission*, 293 F. 2d 774, 778 (9th Cir. 1961); *Safeway Stores, Inc.* v. *Federal Trade Commission*, 366 F. 2d 795, 805 (9th Cir. 1966), *cert. denied*, 386 U.S. 932 (1967).

the language and spirit of the order he is required to obey whether he likes it or not, that this seven-year old litigation may be finally terminated, and will not be before us again." *In re Floersheim,* 316 F. 2d 423, 428 (9th Cir. 1963).

The examiner noted that, just as some people are "accident prone," Floersheim is "violation prone" (I 132). The Commission's order is directly responsive to the violations of law found. It does no more than prohibit the types of deception practiced by Floersheim in the past. There is no basis for Floersheim's efforts to secure a narrower order, particularly in view of his past history of violations and propensity to violate the law. For "in the exercise of [its] discretion" in formulating appropriate remedies, "the Commission can properly consider many factors, such as the frequency and duration of the violations, the business and competitive history of the respondent, including evidence of past violations, and the likelihood that the respondent knew, or should have known, that its conduct was unlawful." *Joseph A. Kaplan & Sons, Inc.* v. *Federal Trade Commission,* 347 F. 2d 785, 789 (D.C. Cir. 1965). *Accord, Carter Products, Inc.* v. *Federal Trade Commission,* 323 F. 2d 523, 532-33 (5th Cir. 1963); *Federal Trade Commission* v. *National Lead Co.,* 352 U.S. 419, 429 (1957).

Floersheim (Pet. Br. 21, 22-25, 28-31) would appraise the scope of the Commission's order to cease and desist on the basis of the examiner's evaluation of what was false and deceptive. Again, Floersheim has forgotten that the Commission's findings are here on review, not those of the examiner (see *supra,* p. 20). And the Commission's order is clearly reasonably responsive to the types of violation found by the Commission, including those which Floersheim has not challenged in its brief to this Court.[49]

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[49] These consist of the findings (1) that Floersheim misrepresented that his Payment Demand forms have been approved by the Commission or were deemed to be in compliance with the Commission's prior order against Floersheim, and (2) that Floersheim's Payment Demand forms intimidated and deceived debtors as to their creditors' rights to attach debtors' property and income (I 256-7).

Finally, Floersheim asserts (Pet. Br. 21-22, 24, 26, 28, 31) that the order would preclude him from mailing forms from Washington, D.C., and would drive him out of business. As the Commission noted (I 262-3):

> * * * This objection is largely hypothetical at the present time since the order does not in terms require that [Floersheim] cease doing business in Washington, D.C., and since [Floersheim] has not shown that this will be the predictable result of the order. We do not hold that [Floersheim] is barred from doing business in Washington, D.C., or from using a Washington, D.C., mailing address if there is a business reason for so doing and if affirmative disclosures made in connection with its use prevent it from being misleading or deceptive; we hold only that on the congeries of facts adduced in this record, [Floersheim's] present use of that address is clearly deceptive and that he must take affirmative steps to terminate the deception. It is for [Floersheim] to comply in any way he deems fit. If his business judgment dictates that he cease doing business here rather than make the disclosures we require in connection with his use of a Washington, D.C., address, that decision is his and not ours; it is not required by our order.

And in *American Medicinal Products, Inc.* v. *Federal Trade Commission,* 136 F. 2d 426, 427 (9th Cir. 1943), this Court, in passing upon an objection to an affirmative disclosure requirement, observed:

> * * * The order does not require petitioners to reveal anything. It requires them to cease and desist from disseminating false advertisements, particularly those described in the order, but does not require them to advertise at all. If petitioners do not choose to advertise truthfully, they may, and should, discontinue advertising.[50]

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[50] Other cases which uphold the propriety of requiring an affirmative disclosure include *Mohr* v. *Federal Trade Commission,*

Similarly, the order here does not require Floersheim to discontinue his business of selling forms and otherwise engaging in the business of securing information concerning delinquent debtors, or assisting in the collection of delinquent accounts. All the order requires is that he conduct his business in a truthful and nondeceptive manner.

CONCLUSION

For the foregoing reasons the Commission's order to cease and desist should be affirmed and enforced in its entirety.[51]

Respectfully submitted.

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Washington, D.C. 20580

February 1969

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272 F. 2d 401, 405 (9th Cir. 1959), *cert denied*, 362 U.S. 920 (1960); and *Kirchner* v. *Federal Trade Commission*, 337 F. 2d 751, 753 (9th Cir. 1964).

[51] "To the extent that the order of the Commission is affirmed, the court shall thereupon issue its own order commanding obedience to the terms of such order of the Commission." Federal Trade Commission Act, Sec. 5(c), 52 Stat. 113, 15 U.S.C. 45(c).

ADDENDUM

FEDERAL TRADE COMMISSION RULES OF PRACTICE FOR ADJUDICATIVE PROCEEDINGS
(Section 3.28, 16 CFR 3.28 (Supp. 1967))

§ 3.28 Reopening.

* * * * *

(b) *After decision has become final.* (1) Whenever the Commission is of the opinion that changed conditions of fact or law or the public interest may require that a Commission decision containing an order to cease and desist which has become final by reason of court affirmance or expiration of the statutory period for court review without a petition for review having been filed, or a Commission decision containing an order dismissing a complaint, should be altered, modified or set aside in whole or in part, the Commission will serve upon each person subject to such decision and order an order to show cause, stating the changes it proposes to make in the decision and the reasons they are deemed necessary. Within thirty (30) days after service of such order to show cause, any person served may file an answer thereto. Any person not responding to the order within the time allowed may be deemed to have consented to the proposed changes.

* * * * *

(3) Whenever an order to show cause or petition to reopen is not opposed, or if opposed but the pleadings do not raise issues of fact to be resolved, the Commission, in its discretion, may decide the matter on the order to show cause or petition and answer thereto, or it may serve upon the parties a notice of hearing, setting forth the date when the cause will be heard. In such a case, the hearing will be limited to the filing of briefs and may include oral argument when deemed necessary by the Commission. When the pleadings raise substantial factual issues, the Commission will direct such hearings as it deems appropriate, including hearings for the receipt of evidence by it or by a hearing examiner. Unless otherwise ordered and insofar as practicable, hearings before a hearing examiner to receive evidence shall be conducted in accordance with Subparts C, D, E and F of this part. Upon conclusion of hearings before a hearing examiner, the record and the hearing examiner's recommendations shall be certified to the Commission for final disposition of the matter.

FEDERAL TRADE COMMISSION RULES OF PRACTICE, EFFECTIVE AUGUST 3, 1951

(Rule V, 16 Fed. Reg. 6503 (1951), revoked 20 Fed. Reg. 3055 (1955))

V Complaints, defaults, consent settlements.

* * * * *

(f) Pursuant to a change of law or facts, or when the public interest so requires, a consent settlement may be altered, modified, or set apart in whole or in part upon consent of all parties. All consent settlements shall contain an agreement that if consent to a change desired is not obtained, the Commission or any respondent may file a motion in the case to set aside such consent settlement in whole or in part on the grounds of change of law or fact or that the public interest so requires; and after opportunity for hearing upon the issues formed, the Commission may, if it finds that a change of law or fact, or the public interest so requires, set aside the consent settlement or any part thereof which is separable from the remaining provisions without changing their effect. Thereafter, the Commission may, by adversary proceedings pursuant to the original complaint, or a new or amended and supplemental complaint, undertake corrective action as to any acts or practices not prohibited by any remaining provisions of the consent settlement.

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